Supreme Court, U.S.
FILED
OCT 12 1994
OFFICE OF THE CLERK

No. 94-262

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HUGHES AIRCRAFT COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

Of Counsel:

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Dated: October 12, 1994

HERBERT L. FENSTER
Counsel of Record
ANDREW N. PETRAKES
MCKENNA & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for Amicus Curiae The Chamber of Commerce of the United States of America

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

26 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE CONVICTION OF ONE CO-CONSPIRATOR DESPITE THE ACQUITTAL OF THE OTHER, WHO IS A NECESSARY PARTY TO SUCH CONSPIRACY, CANNOT BE UPHELD	4
A. The Acquittal of LaRue, an Indispensable Party to the Alleged Conspiracy, Precludes the Existence of a Conspiracy	4
B. The General Rule Upholding Inconsistent Verdicts as to Individual Defendants Is Not Applicable to Conspiracy Cases	8
II. WITHOUT THE PARTICIPATION OF LARUE, THE CONSPIRACY OF WHICH HUGHES WAS CONVICTED COULD ONLY CONSIST OF ONE EMPLOYEE AND, THUS, CANNOT BE UPHELD	12
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

CASES — Page

Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 7
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 7
City of Los Angeles v. Heller, 475 U.S. 796 (1986) (per curiam) 7, 8
Davis v. United States, 160 U.S. 469 (1895) 18
DeMarco v. United States, 415 U.S. 449 (1974) 6
Dunn v. United States, 284 U.S. 390 (1932) 9, 10, 12
Francis v. Franklin, 471 U.S. 307 (1985) 18
Harris v. Rivera, 454 U.S. 339 (1981) (per curiam) 9
Hartzel v. United States, 322 U.S. 680 (1944) 9, 10, 12
Iannelli v. United States, 420 U.S. 770 (1975) 15, 18
In re Winship, 397 U.S. 358 (1970) 18
Maine v. Taylor, 477 U.S. 131 (1986) 6, 7, 8
Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) 16
Palazzo v. Gulf Oil Corp., 764 F.2d 1381 (11th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986) 5, 14
Pullman-Standard v. Swint, 456 U.S. 273 (1982) 6
Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533 (1983) (per curiam) 10
United States v. Ames Sintering Co., 927 F.2d 232 (6th Cir. 1990) (per curiam) 13
United States v. Carroll, 144 F. Supp. 939 (S.D. N.Y. 1956), *aff'd sub nom. United States v. Sheba Bracelets, Inc.*, 248 F.2d 134 (2d Cir.), *cert. denied*, 355 U.S. 904 (1957) 14, 15, 16, 17
United States v. General Dynamics Corp., 644 F. Supp. 1497 (C.D. Cal. 1986), *rev'd on other grounds*, 828 F.2d 1356 (9th Cir. 1987) 17
United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) 13
United States v. Hughes Aircraft Co., 20 F.3d 974 (9th Cir. 1994) ..... *passim*
United States v. Kismetoglu, 476 F.2d 269 (9th Cir.) (per curiam), *cert. dismissed*, 410 U.S. 976 (1973) 10

TABLE OF AUTHORITIES—Continued

Page

United States v. Lopez, 989 F.2d 1032 (9th Cir. 1993) 6, 7
United States v. Mancillas, 580 F.2d 1301 (7th Cir.), *cert. denied*, 439 U.S. 958 (1978) 18
United States v. Notarantonio, 758 F.2d 777 (1st Cir. 1985) 13
United States v. Peters, 732 F.2d 1004 (1st Cir. 1984) 14
United States v. Powell, 469 U.S. 57 (1984) 9, 10, 11, 12
United States v. S & Vee Cartage Co., 704 F.2d 914 (6th Cir.), *cert. denied*, 464 U.S. 935 (1983) 13
United States v. Stevens, 909 F.2d 431 (11th Cir. 1990) 13, 14, 15, 16
United States v. Suntar Roofing, Inc., 897 F.2d 469 (10th Cir. 1990) 10

CONSTITUTION AND STATUTES

U.S. Const. amend. XIV 18, 19
18 U.S.C. § 371 (1988) ..... *passim*

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of businesses, companies, and associations in the world. With substantial membership in each of the fifty states, the Chamber represents more than 220,000 businesses and organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in critical issues before the Supreme Court of the United States, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. The Chamber also seeks to advance those interests by filing briefs in cases of importance to the business community.[1]

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit has serious adverse implications for both large and small corporations alike. The decision below is of great concern to the Chamber's members in that it upholds the conviction of a corporation for criminal conspiracy based on the acts of one co-conspirator who, at the time the alleged acts were committed, was an employee of the company acting within the scope of his authority. Moreover, this individual employee was acquitted by a jury of conspiring with any other person. In the Chamber's view, it defies logic and ignores the well-established decisions of this Court that a corporation can be liable for criminal conspiracy with one of its own individual employees when, on the same evidence, that agent, who is an indispensable party to the conspiracy, is acquitted of entering into such a conspiracy.

---

[1] Petitioner Hughes Aircraft Company and Respondent United States of America have consented to the filing of this amicus brief. Their respective letters of consent are filed herewith.

The appellate court's decision effectively allows the existence of a conspiracy between two persons, one natural and one fictitious, based on the innocent acts of the natural person which are then imputed to the corporation as conduct deemed to be conspiratorial. Such an unwarranted extension of corporate liability serves no useful purpose in deterring criminal confederation, which is one of the primary rationales for punishing conspiracy. Moreover, if any action taken by an individual acting for the benefit of the corporation, once imputed to the corporation, constitutes a conspiracy between the agent and the corporate entity, otherwise legitimate corporate decision-making and economic management necessary for the proper functioning of the business will be seriously chilled. This effect will be felt particularly hard by those members of the Chamber who are often small or very closely held companies who typically conduct their everyday business activities through one or very few natural persons. In that the decision below constitutes an unwarranted over-extension of the fiction of corporate personality, the Chamber thus believes that it will have substantial detrimental impact upon the business community in general.

Because the Chamber believes it is important for this Court to recognize the significance of this issue to the business community, and because the Ninth Circuit's interpretation and application of conspiracy law and the federal conspiracy statute at issue is in conflict with applicable decisions of this Court as well as other courts of appeal, the Court should grant the petition for writ of certiorari.

SUMMARY OF ARGUMENT

In the instant case, a corporation was found guilty of criminal conspiracy despite the fact that at the same trial no other natural person was found to have engaged in any substantive criminal or conspiratorial act whatsoever. Indeed, the Ninth Circuit upheld the conspiracy conviction of the company, despite the jury's acquittal of the one individual employee who was the "hub" and, therefore, the indispensable party to such a conspiracy.

Without the participation of at least two natural persons, there can be no conspiracy, much less one that can be attributed to a fictitious person such as a corporation. In that a corporation cannot itself participate in criminal activity, but only may be guilty of such conduct, if at all, through the imputed acts of its employees, the Ninth Circuit's opinion defies logic. Moreover, in applying the general rule that inconsistent jury verdicts against a single defendant are not grounds for reversal, the Ninth Circuit's decision ignores the clear precedent of this Court with respect to conspiracy cases, which require the interaction and, thus, the conviction, of at least two natural persons.

Because the appellate court's decision has defied logic and is in conflict with the well-settled and currently viable doctrines of this Court with regard to the conviction of but one co-conspirator, this is a case clearly requiring the exercise of the Court's power of supervision.

In addition, without the requisite number of persons necessary to communicate and independently reach an agreement, not only can there be no conspiracy, but none of the reasons for separately punishing and deterring criminal organization are present.

If permitted to stand, the ruling below will have a substantial detrimental impact on the Chamber's members, particularly those businesses which are small or closely held. If every action, statement or decision undertaken by an individual employee (without communication with

another natural person) theoretically could result in a conspiracy between the employee and the corporation, a company's ability to effectively manage its affairs will be seriously impaired. This is because meaningful consultation and discussion necessary for day-to-day operation and management of the business will be severely impeded. Moreover, the decision below disparately and unfairly treats those who have chosen to act through a corporate form as opposed to some other business device.

Because the Ninth Circuit's decision has significant adverse ramifications on the business community in this country and ignores the reality of the manner in which many small and closely held companies function, this Court should grant the petition for a writ of certiorari.

ARGUMENT

I. THE CONVICTION OF ONE CO-CONSPIRATOR DESPITE THE ACQUITTAL OF THE OTHER, WHO IS A NECESSARY PARTY TO SUCH CONSPIRACY, CANNOT BE UPHELD

A. The Acquittal of LaRue, an Indispensable Party to the Alleged Conspiracy, Precludes the Existence of a Conspiracy

The general federal conspiracy statute under which Hughes Aircraft Company, Inc. ("Hughes") and Donald LaRue ("LaRue") were charged, 18 U.S.C. § 371 (1988), requires the agreement of two or more persons to commit any offense against or to defraud the United States, and one or more of such persons to do any act to effect the object of the conspiracy.[2] The government alleged the existence of a "wheel" type of conspiracy with LaRue as the necessary "hub" or conduit and the four unindicted co-conspirators, who were similarly employed at Hughes, as the "spokes." However, no "rim"

---

[2] The statute is reprinted in its entirety in the Appendix to Hughes' Petition for Writ of Certiorari (hereinafter referred to as "Pet. App.") filed with the Court in this matter on August 11, 1994. Pet. App. 2a n.1.

connecting the spokes was alleged to exist. As the district court noted in its Order Denying Motion for Judgment of Acquittal or New Trial, "[d]uring the trial, Hughes, the government and the Court agreed that Hughes could be guilty of conspiracy only if LaRue was found to have conspired with one of the four unindicted Hughes employees." Pet. App. 14a. The extent of Hughes' conspiracy liability, therefore, necessarily was consistent with that of LaRue, whose conduct was attributed to Hughes on the basis of *respondeat superior*.

Since a corporation, as a wholly fictitious person, is incapable of acting for itself, its conduct only may be imputed from the actions of natural persons acting on behalf of the corporation. *See Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986) ("[t]he rule is well established that a corporation is an artificial entity that can act only through agents . . . ."). Accordingly, the jury was instructed that for Hughes to be found guilty of conspiracy, such a conspiracy would have to consist of "LaRue, and at least one of the unindicted co-conspirators." Pet. App. 31a. The conspiracy thus alleged by the government was required to include more than one natural person, *i.e.*, LaRue and at least one of the four unindicted employees. LaRue was the hub or common denominator through which the conspiracy operated with the unindicted co-conspirators. Despite the charge to the jury and the "paucity of evidence at trial supporting any other theory of Hughes' culpability," the jury acquitted LaRue of all criminal charges, but somehow convicted Hughes of conspiracy. Pet. App. 14a.

What this case thus presents is not merely a "stark inconsistency," but rather an impossibility. *See* Pet. App. 28a. Any such conspiracy was required to involve, at a minimum, LaRue; that is, the government did not attempt to prove that any other set of two (not including LaRue) conspired. The Ninth Circuit attempted to circumvent

this requirement by determining that "the jury could have found Hughes guilty based on the actions or omissions of its supervisors and employees other than LaRue." *United States v. Hughes Aircraft Co.*, 20 F.3d 974, 978 (9th Cir. 1994). Such a finding, having no factual support in the record, is plainly wrong and, in fact, ignores the trial court's instructions on this point which were repeated on three separate occasions. Moreover, the district court specifically found that "[d]uring the trial, Hughes, the government and the Court agreed that Hughes could be guilty of conspiracy *only if LaRue was found to have conspired* with one of the four unindicted Hughes employees. . . . The jury was so instructed." Pet. App. 14a (emphasis added).[3] Finally, the district court also noted that the government presented no evidence that would sustain Hughes' conspiracy conviction on any other theory.[4] *Id.*

There exist two fatal flaws in the Ninth Circuit's determination. First, it is axiomatic that "factfinding is the basic responsibility of district courts, rather than appellate courts." *Pullman-Standard v. Swint,* 456 U.S. 273, 291 (1982) (quoting *DeMarco v. United States,* 415 U.S. 449, 450 n. (1974)). As this Court frequently has held, "appellate courts are not to decide factual questions *de novo,* reversing any findings they would have made differently." *Maine v. Taylor,* 477 U.S. 131, 145 (1986) (citations omitted). Rather, the district court's findings of fact are reviewed for clear error. *United States v.*

---

[3] This point was underscored by the district court which noted during its review of the proposed jury instructions that "[t]he government, I assume, would agree that if LaRue is not a co-conspirator, there isn't any conspiracy, I mean under the facts of the case." Appendix ("App.") 2a.

[4] Again, the district court recognized this point during its review of the jury instructions, chiding the government that "if you think the jury can find a conspiracy between [some of the unindicted co-conspirators], then I sure want to know about it because I don't think it could possibly stand and I don't think you think it could stand." App. 2a.

Lopez, 989 F.2d 1032, 1036 (9th Cir. 1993), and such findings will be adjudged clearly erroneous only when the reviewing court is left with the definite and firm conviction that, on the entire evidence, a mistake has been committed. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (citation omitted).

In its opinion below, the Ninth Circuit did not apply the *de novo* standard of review, nor did it merely apply the clearly erroneous standard incorrectly. Amazingly, it undertook *absolutely no analysis* of the district court's findings on this point. Rather, it assumed critical facts, not only in complete ignorance of the record below, but in stark contradiction to the trial court's findings. Indeed, the Ninth Circuit offered not one citation to the record for its conclusion that the jury could have convicted Hughes of conspiracy based on the conduct of its employees other than LaRue. *See Hughes*, 20 F.3d at 978. Clearly, this is because no support, in fact, exists in the record to support such a determination. The Ninth Circuit's complete disregard for the deference accorded the trial judge with regard to such factual questions ignores the mandates of this Court as well as its own and, as such, cannot be sustained. *Taylor*, 477 U.S. at 145; *see also Lopez*, 989 F.2d at 1036.

In addition, as this Court has made clear, courts are not free to speculate on the theories by which juries reach their verdicts. *See City of Los Angeles v. Heller*, 475 U.S. 796, 798 (1986) (per curiam). Rather, juries are presumed to act in accordance with the instructions given them, and not to consider and base their decisions on legal questions with respect to which they are not charged. *Id.* at 798 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985)). Thus, jury verdicts may be upheld only on theories actually presented to the jury, and an appellate court's "search for ambiguity in the verdict [will be] unavailing." *Id.*

In the decision below, the Ninth Circuit's *post hoc* rationalization that there exists some theory in support of

the jury's verdict cannot stand because it simply was not presented to the jury. The jury was instructed that Hughes could only be liable through the acts of LaRue, and then only if LaRue conspired with any one of up to four other Hughes employees. Pet. App. 31a. Thus, for Hughes to be convicted, the jury was required to find at least one conspiracy involving LaRue. Because the jury failed to satisfy such a prerequisite for Hughes' culpability, by finding LaRue not guilty, the jury's verdict cannot be upheld. The Ninth Circuit's abject speculation as to possible rationales by which the jury could convict Hughes while acquitting LaRue, in direct contradiction to the record below, is prohibited. *See Heller,* 475 U.S. at 798. This is because the trial court, which is uniquely qualified to make such factual determinations, allowed no such theory under which Hughes could have been convicted to be presented to the jury. *See Taylor,* 477 U.S. at 145; *Heller,* 475 U.S. at 798.

Because the district court found that the evidence adduced at trial was legally insufficient to support such an instruction, in that the conspiracy presented at trial could only implicate the unindicted co-conspirators with and through the participation of LaRue, the jury could not have found Hughes guilty based solely on the acts of the other Hughes employees. Since LaRue was acquitted of engaging in conspiratorial conduct, on the evidence presented and the jury instructions given, no conspiracy could have existed and, thus, none could be attributed to Hughes. Therefore, the jury's conviction of Hughes cannot be upheld. *See Heller,* 475 U.S. at 798.

B. The General Rule Upholding Inconsistent Verdicts as to Individual Defendants Is Not Applicable to Conspiracy Cases

There is a logical distinction between criminal conduct by two or more persons which can take place "in parallel" (that is, without requiring personal interaction) and criminal conduct which, to have taken place at all, *must* embody the interaction of two or more natural persons.

This Court has long recognized a distinction between the situation in which an individual defendant receives inconsistent verdicts on multiple counts and the situation in which all alleged co-conspirators but one are acquitted. *Dunn v. United States,* 284 U.S. 390 (1932), established the general principle that inconsistency between verdicts does not generally constitute valid grounds for the reversal of an individual's conviction. *See id.* at 393. However, in *Hartzel v. United States,* 322 U.S. 680 (1944), this Court reaffirmed the established common law rule that a conspiracy cannot be held to exist if all alleged co-conspirators but one are acquitted. *Id.* at 682 n.3. Thus, the *Hartzel* Court held that where only one of three alleged co-conspirators was convicted, it was "impossible to sustain [his] conviction upon . . . the conspiracy count." *Id.*

Both the general rule of upholding inconsistent verdicts and the "rule of consistency" in conspiracy law have coexisted as two separate and distinct lines of cases in the Supreme Court. Indeed, in *Harris v. Rivera,* 454 U.S. 339 (1981) (per curiam), the only Supreme Court case which addresses both *Dunn* and *Hartzel,* this Court recognized the distinction. In *Harris,* which addressed inconsistent verdicts (not relating to conspiracy) against multiple defendants, the Court explicitly contrasted *Hartzel*'s rule of consistency holding that the conviction of but one co-conspirator is "impossible to sustain" with the *Dunn* rule that for individual defendants "[i]nconsistency in a verdict is not a sufficient reason for setting it aside." *Id.* at 345 & n.13 (citing *Dunn,* 284 U.S. at 393; *Hartzel,* 322 U.S. at 682 n.3). Nevertheless, in its decision below, the Ninth Circuit inexplicably determined that the *Dunn* rule (expanded upon by *United States v. Powell,* 469 U.S. 57 (1984)) applicable to individual defendants encompasses and, therefore, overrules the rule of consistency in conspiracy cases.[5]

---

[5] To read *Dunn* and *Powell* as rejecting the rule of consistency in conspiracy cases clearly established by this Court in *Hartzel*

The Ninth Circuit's holding is particularly puzzling in light of this Court's decision in *Powell*, which essentially employed an analysis as to which party derives the benefits and which party suffers the burdens of verdict inconsistency to explain why an individual defendant who had received inconsistent verdicts on multiple counts would not be permitted to invalidate his conviction. *See id.* at 65-69. *Powell* does not address *Hartzel* or any of this Court's conspiracy rule of consistency cases, and its rationale does not extend to the criminal conspiracy situation presented here. *See United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 475 & n.3 (10th Cir. 1990).

Powell's core holding is its analysis of the three possible reasons for verdict inconsistency, *i.e.*, jury lenience, a mistaken acquittal or a mistaken conviction, and which party derives the benefits and/or suffers the burdens thereof. *See Powell* at 65-69. Leniency obviously results in a benefit to the defendant and a burden to the government, as does a mistaken acquittal. The only possibility which benefits the government is a mistaken conviction. *See id.* at 65, 68. Unlike the government, which cannot appeal an acquittal, the defendant may still seek to set aside the conviction, but verdict inconsistency may not be the basis therefor. *See id.* at 67. However, "a criminal defendant already is afforded protection against jury irra-

---

would require one to interpret *Hartzel* as overruling *Dunn*, in part by implication, and *Powell* later overruling *Hartzel* by implication. Such speculation as to whether a Supreme Court decision remains good law is strongly disfavored, however, and should be avoided. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam) ("only this Court may overrule one of its precedents"). In fact, the Tenth Circuit specifically found that *Powell* did not abrogate the rule of consistency in that *Powell* neither discussed nor expressly overturned *Hartzel*. *See United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 475 & n.3 (10th Cir. 1990). It thus follows that *Hartzel* remains good law, which the lower courts are bound to uphold. *See United States v. Kismetoglu*, 476 F.2d 269, 270 (9th Cir.) (per curiam), *cert. dismissed*, 410 U.S. 976 (1973) ("[w]e are bound to follow the opinion of the Supreme Court").

tionality or error by the independent review of the sufficiency of the evidence. . . ." *Id.* None of the rationales supporting *Powell*'s benefit/burden analysis, however, apply to the conspiracy presented in the instant case. This is because Hughes receives no benefit if LaRue's acquittal was based on leniency or mistake. Indeed, Hughes is burdened by LaRue's acquittal almost as much as the government, primarily because LaRue obviously will not appeal such an acquittal. Thus, the effect on Hughes of the Ninth Circuit's decision is that LaRue's acquittal is functionally equivalent to a non-appealable determination of LaRue's guilt—guilt which is then imputed to Hughes.[6]

Finally, Hughes would be similarly burdened if its conviction, rather than LaRue's acquittal, was the result of jury error. Thus, *Powell*'s analysis of which party receives the benefits and the burdens of an inconsistent jury verdict, as well as the rationale therefor, simply does not apply to the conspiracy rule of consistency situation raised below. There is no scenario under which Hughes could have benefited from LaRue's acquittal, and, in fact, a high probability that Hughes actually was harmed by it.[7]

---

[6] Although Hughes theoretically still has the recourse of a sufficiency of evidence review of its conviction, the Ninth Circuit determined only that the jury could have found Hughes guilty on the basis of evidence presented against Hughes and not LaRue. *See Hughes*, 20 F.3d at 978. It did not find the evidence against LaRue sufficient; nor would one ever expect a very diligent review of the evidence presented against an acquitted defendant. Therefore, although available in theory to the sole convicted co-conspirator, the "protection against jury irrationality or error by the independent review of the sufficiency of the evidence" underpinning this court's holding in *Powell*, is not available in reality. *See Powell*, 469 U.S. at 67.

[7] Moreover, where the conduct of one co-conspirator actually must be imputed to the other co-conspirator for the other to be guilty of consipracy, there simply is no way to treat the acquittal of one co-conspirator as *Powell* treats single defendant acquittals, *i.e.*, by acting as if the charges were never brought. *See Powell*,

Therefore, the rule of consistency, because of the unique requirement that there be a plurality of actors to constitute a conspiracy, is not an *exception* to the general rule established by this Court insulating inconsistent jury verdicts from review. Rather, both rules are separate, distinct and currently viable legal doctrines in this Court; however, the rule established in *Dunn* and *Powell* upholding inconsistent verdicts rendered against a single defendant is not applicable to conspiracy. Furthermore, in that Hughes' sole co-conspirator, whose individual conduct also was imputed to Hughes, was acquitted of engaging in substantive criminal or conspiratorial acts, Hughes' conviction for conspiracy is not merely inconsistent, but rather, is "impossible to sustain." *See Hartzel*, 322 U.S. at 682 n.3.

Inconsistent jury verdicts, while permissible where individual defendants act in parallel to commit a crime, cannot be upheld where *interaction* among such individuals is required for there to have been a crime in the first place. As with the conspiracy present here, in that LaRue did not conspire with the other Hughes employees, and the employees could not have conspired with each other, the requisite interaction is not present, such that the inconsistent treatment of Hughes cannot be permitted to stand.

II. WITHOUT THE PARTICIPATION OF LARUE, THE CONSPIRACY OF WHICH HUGHES WAS CONVICTED COULD ONLY CONSIST OF ONE EMPLOYEE AND, THUS, CANNOT BE UPHELD

The government alleged the existence of up to four separate two-person conspiracies, each of which involved LaRue. That is, the indictment did *not* charge any conspiratorial conduct *among* the other four. The trial

---

469 U.S. at 65-69. This is because if LaRue's acquittal is treated as though he had not been charged with conspiracy, under the government's theory of the case, then Hughes could not have been charged with conspiracy in the first place, much less convicted thereof.

court's instructions confirmed that LaRue was a necessary party to any such agreement(s). Pet. App. 14a, 31a. The jury, by acquitting LaRue of conspiracy, thus deprived each of the alleged conspiracies of an essential member. What therefore remains is that Hughes' liability is predicated on the acts of one or more natural persons who, as a matter of law, did not interact either with LaRue or with each other. Such conduct, absent illegal interaction with any other natural person, stands alone, yet when imputed to the company is deemed conspiratorial.

In essence, each of the four possible conspiratorial relationships for which Hughes could have been convicted may be based *only* upon the conduct of one of the unindicted, individual employees, acting in relationship to LaRue and on behalf of Hughes, whose actions are then attributed to the company in order to establish the plurality of actors necessary to form a conspiracy. Although the Ninth Circuit in the decision below noted that "[a] conspiracy arises when more than one [meaning, of course, two or more natural persons] of [a corporation's] employees agree to defraud the government," *Hughes*, 20 F.3d at 980, by upholding Hughes' conviction, the court implicitly has determined that a corporation may be guilty of conspiracy based on the acts of, at most, one of its employees. *See id.* This postulation is, in a sense, oxymoronic because it presumptively assumes that only one person is necessary for a conspiracy, thus, omitting the "communication" which is the *sine qua non* of a conspiracy.

Several circuits have declared that a corporation can be convicted of conspiracy under 18 U.S.C. § 371 for the acts of at least two of its individual employees.[8] How-

---

[8] *See, e.g., United States v. Ames Sintering Co.*, 927 F.2d 232, 236-37 (6th Cir. 1990) (per curiam); *United States v. Stevens*, 909 F.2d 431, 432 (11th Cir. 1990); *United States v. S & Vee Cartage Co.*, 704 F.2d 914, 920 (6th Cir.), *cert. denied*, 464 U.S. 935 (1983); *United States v. Hartley*, 678 F.2d 961, 972 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *but see United States v. Notarantonio*, 758 F.2d 777, 789-90 (1st Cir. 1985).

ever, no lower court has yet held that a corporation can be convicted of criminal conspiracy pursuant to 18 U.S.C. § 371 based on the acts of one employee, whose conduct is then imputed to the company on the basis of *respondeat superior*, in order to establish the requisite plurality of actors necessary to form a conspiracy. *See United States v. Stevens*, 909 F.2d 431, 432-33 (11th Cir. 1990) (in that there is a lack of creative interaction between two autonomous and independent actors, "[t]he argument that a single human actor can be convicted of conspiracy under § 371 . . . flies in the face of the traditional justification for criminal conspiracies")[9]

As the district court set forth in its instructions to the jury, a corporation cannot act for itself. Pet. App. 30a. Since a corporation cannot itself commit criminal acts, it is never an *actual participant* in any crime; rather it participates, if at all, through its employees and agents. *See Stevens*, 909 F.2d at 432-33; *Palazzo*, 764 F.2d at 1385; *United States v. Carroll*, 144 F. Supp. 939, 942 (S.D.N.Y. 1956), *aff'd sub nom. United States v. Sheba Bracelets, Inc.*, 248 F.2d 134 (2d Cir.), *cert. denied*, 355 U.S. 904 (1957). Corporate liability, therefore, is vicarious in that it is premised on the actions of its officers, agents and employees which are imputed to the corporation. It is these individuals, therefore, who must interact in order to reach an agreement that may be deemed conspiratorial.

---

[9] *See also United States v. Carroll*, 144 F. Supp. 939, 942 (S.D.N.Y. 1956), *aff'd sub nom. United States v. Sheba Bracelets, Inc.*, 248 F.2d 134 (2d Cir.), *cert. denied*, 355 U.S. 904 (1957) (where the government failed to prove a conspiracy among several individuals, "it seeks to accomplish the same purpose of breathing life and purpose, and thereby creating the requisite independent personality, into an institution manipulated solely by the individual from whom independence is required for criminality. This, the prosecution cannot do and it must fail on this count."). The First Circuit has reached a similar conclusion, albeit in dictum, noting that "[a] corporate officer, acting *alone* on behalf of the corporation, could not be convicted of conspiring with the corporation." *United States v. Peters*, 732 F.2d 1004, 1008 n.6 (1st Cir. 1984) (citation omitted).

The Ninth Circuit's decision, in essence, permits the existence of a conspiracy consisting solely of one natural person (an individual employee) acting in concert with no other natural person to benefit the company. That is, *none* of the four unindicted Hughes employees, who could not have conspired with any Hughes employee other than LaRue and who did not conspire with LaRue, could have interacted with any other "person" except the corporate entity. *See* Pet. App. 31a. Such "interaction" is impossible in that a corporation, as a wholly fictitious person, is itself incapable of acting or interacting and, thus, it cannot be one of the actors necessary to form a conspiracy. Absent the requisite number of independent persons necessary to form an agreement, no conspiracy exists for which Hughes can be liable.[10] *See Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) ("[t]he essence of the crime of conspiracy is agreement").

The decision below, however, has ramifications far beyond the interests of the parties themselves. The Ninth Circuit's upholding of Hughes' conviction also will have a profound effect on the Chamber's constituents, many of whom are small or closely held corporations. Many of these companies consist of one or very few individuals charged with day-to-day management and operation of the business. The Ninth Circuit's ruling raises the specter that every decision of an individual officer, agent or employee, if undertaken within the scope of his/her duties, once imputed to the corporation, conceivably could be deemed an agreement necessary to form a conspiracy with the company when there is not a second natural person involved.

---

[10] Although it has been posited that a natural person can decide as an individual to pursue an illegal course of conduct and at the same time make up the "mind" of the corporation for whom he acts, courts have rejected this theory because it lacks the necessary "interaction between multiple autonomous actors." *Stevens*, 909 F.2d at 434; *see Carroll*, 144 F. Supp. at 942 ("the traditional understanding of the term conspiracy repels such a notion").

Such a broad interpretation of the general federal conspiracy statute is a clear over-extension of the fiction of the corporate personality. *See Stevens,* 909 F.2d at 433 n.8 (citing *Carroll,* 144 F. Supp. at 941) (other citations omitted). Since none of the traditional reasons for separately punishing conspiracy are present in a small or closely held company there exists little, if any, additional deterrent effect of subjecting the corporation to potential conspiracy liability. Both the company and the individual officers and employees still may be liable for the underlying substantive criminal offense(s). Moreover, since a small company cannot simply change its corporate structure, *i.e.,* decision-making still must be performed by one or few persons, it is grossly unfair to mete out more severe punishment just because the crime was committed through a corporate form as opposed to some other business device. *See Carroll,* 144 F. Supp. at 942; *see also Nelson Radio & Supply Co. v. Motorola, Inc.,* 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953) (a corporation does not engage in conspiracy when it carries out managerial policy through its officers and agents, "which is the only medium through which it can possibly act").

Another consequence of the decision below which is of great concern to the Chamber's members, both large and small, is the effect it will have on a company's ability to effectively manage its operations. If, as the Ninth Circuit believes, practically any individual action taken within the corporate framework ultimately can result in a conspiracy by imputing such conduct to the corporation in order to form a plurality, then meaningful consultation and discussion necessary for economic management of the business will be severely chilled. *See, e.g., Nelson Radio,* 200 F.2d at 914 (in an antitrust context, communication among those engaged in management and day-to-day operation of the company does not result in the company being engaged in an unlawful conspiracy).

This is particularly troublesome in the present situation where Hughes was in the business of manufacturing components for use in connection with government contracts. Government procurement statutes and regulations are among the most complex ever devised. *See United States v. General Dynamics Corp.*, 644 F. Supp. 1497, 1499, 1504 (C.D. Cal. 1986), *rev'd on other grounds*, 828 F.2d 1356 (9th Cir. 1987) (noting that the webs of government procurement laws, regulations and directives are so "arcane," they "almost defy understanding"). Such requirements routinely are subject to widely ranging interpretations.

Thus, frank discussion is both inevitable and necessary within the corporate structure to ensure such regulations are implemented properly and, simply to sort out what is legal from what is not. It is precisely this type of situation, involving the origination and interpretation of complex rules and regulations, in which open discussion is absolutely critical in order to chart an appropriate course of corporate conduct. The effect of the ruling below would be to severely discourage such necessary intracorporate communication for fear of being deemed conspiratorial. By essentially promoting silence, the Ninth Circuit's decision actually will serve to counteract the very intent of the myriad of government procurement regulations—which is to benefit the United States. *See General Dynamics*, 644 F. Supp. at 1504 (government regulation of the defense industry is "designed to assure the ultimate protection of the national interests, both technologically and economically"). More importantly, however, by contributing to the prevention of efficient and proper conduct of corporate affairs by discouraging necessary communication, the Ninth Circuit's decision constitutes an impermissible overextension of the conspiracy statute at issue to reach standalone conduct of individual employees. *See Carroll*, 144 F. Supp. at 941.

Of additional concern to the Chamber's members who are small or closely held, is that if the illegal conduct of

an individual employee then can be imputed to the corporation to form a conspiracy, the underlying substantive criminal offense is, in effect, being combined with the conspiracy. This is because there is no practical way to separate or project the elements of the conspiracy offense from the elements of the predicate offense. If these requirements simply can be attributed to a fictitious person based solely on the acts of one natural person, then the government, in essence, is relieved of its constitutional requirement to prove beyond a reasonable doubt the existence of an agreement between two or more persons.[11] *See United States v. Mancillas*, 580 F.2d 1301, 1307 (7th Cir.), *cert. denied*, 439 U.S. 958 (1978) (because "conspiracy requires a concert of action between two or more persons for a common purpose," the government must prove beyond a reasonable doubt that at least two people entered into an agreement).

Because the inchoate crime of conspiracy is separate and independent of the underlying substantive offense, distinct elements of proof are required to establish the existence of an agreement between a plurality of actors. *See Iannelli*, 420 U.S. at 785 n.17 (in that conspiracy and substantive offenses essentially are different, proof of each necessarily requires proof of facts not necessary to convict for the other). The ruling below thus impermissibly allows the government to circumvent its constitutionally mandated burden to prove beyond a reasonable doubt the existence of each element necessary to establish a criminal conspiracy. *See Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Iannelli*, 420 U.S. at 785 n.17.

---

[11] The due process clause of the Fourteenth Amendment to the Constitution protects against conviction of an accused except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *Francis v. Franklin*, 471 U.S. 307, 313 (1985). In a criminal prosecution, therefore, the government bears the burden of proving beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged. *In re Winship*, 397 U.S. 358, 364 (1970); *Davis v. United States*, 160 U.S. 469, 487 (1895).

The Ninth Circuit's decision essentially permits a corporation to be convicted of conspiracy based on the conduct of one natural person acting on behalf of the corporation, yet interacting with no other natural person. Such a ruling is in direct conflict with the decisions of other circuits who have reached this question. Moreover, it ignores the well-established reasons for separately punishing and deterring conspiracy.

However, even more important to the Chamber is the significant detrimental effect the decision below will have on the business community. By conceivably elevating every individual act or omission to the level of conspiring with the corporation, the appellate court has illogically over-extended the boundaries of the corporate fiction. Not only does there exist no reason for such an extension, but the decision unfairly penalizes corporations and will act to discourage meaningful consultation within the corporate structure—discussion necessary for the sound management and operation of the company.

Finally, the Ninth Circuit's ruling, by dispensing with the requirement that a plurality of actors reach an agreement to do an illegal act, effectively combines the underlying substantive offense with the conspiracy offense. This allows the government to circumvent its burden to prove beyond a reasonable doubt that each element of the separate conspiracy charge, in fact, occurred. Such a result cannot be squared with the decisions of this Court and the circuit courts of appeal, as well as the Fourteenth Amendment to the Constitution and, as such, cannot be upheld.

CONCLUSION

For the reasons stated above, the Chamber of Commerce of the United States of America respectfully requests the Court to grant the petition for writ of certiorari.

Respectfully submitted,

Of Counsel:

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

HERBERT L. FENSTER
Counsel of Record
ANDREW N. PETRAKES
MCKENNA & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for Amicus Curiae
The Chamber of Commerce of
the United States of America

Dated: October 12, 1994

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Criminal No. 91-1022-WMB

UNITED STATES OF AMERICA,
Plaintiff,

v.

HUGHES AIRCRAFT CO., INC. and
DONALD ANTHONY LARUE,
Defendants.

EXCERPT OF REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California
Tuesday, June 9, 1992

---

* * * *

[68] MR. SANDERS: But on the other hand, harkening back to our intra co-conspiracy notion, if the jury should find it was LaRue and Hughes, then there would be no conspiracy.

THE COURT: It can't be LaRue and Hughes here.

MR. SANDERS: Maybe I'm misunderstanding how you are saying it then.

MR. PAPELIAN: I thought the Court indicated that LaRue was part of the individuals at Hughes.

MR. SANDERS: Your Honor, could you repeat the second element again?

THE COURT: Yes. Let me just—you might have a point. Let me see if I can change it.

The government, I assume, would agree that if LaRue is not a co-conspirator, there isn't any conspiracy, I mean under the facts of the case.

MR. NEWHOUSE: Well—

THE COURT: I mean you have got to be dying for a conviction if you want one on Goodearl and Ibarra, or [69] something like that, or Tolby.

If LaRue isn't there—

MR. NEWHOUSE: I think it is unlikely, but I think the evidence would support a conviction—

THE COURT: Well then, I want special interrogatories and I want them prepared by the government because if it's going to be, if you think the jury can find a conspiracy between Goodearl and Tolby, then I sure want to know about it because I don't think it could possibly stand and I don't think you think it could stand.

MR. NEWHOUSE: Well, your Honor, we would prefer the Court's wrong. We have—I don't know. I wouldn't know how to draft a special interrogatory.

THE COURT: Well, I mean I can draft it. My court reporter is looking at me because she hears me, case after case, swear that I am not going to do the jury instructions and special interrogatories for the lawyers any more and I end up doing them.

It would have to be LaRue and at least one of the unindicted co-conspirators.

MR. SANDERS: That's what it has to be.

MR. NEWHOUSE: All right.

(Pause in the proceedings.)

THE COURT: Okay. Any objection to that form?

MR. NEWHOUSE: No, your Honor.

* * * *